PUBLIC PROSECUTOR

v.

MUSLI OLI

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN TEE AH SING JC.
[CRIMINAL APPEAL NO. K 42-11-1993]
20 OCTOBER 1994

EVIDENCE: *Corruption - Whether prosecution witness a participant in the "bargaining" for the bribe - Whether an accomplice - Whether corroboration of her testimony necessary - Sections 3(a)(ii), 4(a) & 18 Prevention of Corruption Act 1961.*

EVIDENCE: *Whether prosecution witness a reliable witness - Assessment of demeanour before trial Court - Whether appellate Court can accept it.*

EVIDENCE: *Whether due consideration given to explanation by accused - Whether reasonable doubt raised.*

The appellant, a Customs Superintendent, was convicted on two charges of corruption by the Kota Kinabalu Sessions Court under s. 3(a)(ii) and s. 4(a) of the Prevention of Corruption Act 1961. For the first charge he was sentenced to 1 day imprisonment and fined RM1,000 in default 2 months imprisonment. On the second charge, he was sentenced to 4 months imprisonment and ordered to pay a penalty of RM800 to the Government.

The facts showed that the appellant had solicited the bribe through telephone which he made to one Ho Mui Nyuk (PW3) who was an account clerk of the complainant. PW3 subsequently acted as a go-between in the "bargaining" about the bribe between the appellant and the complainant company's officer.

Upon complaint to the Anti Corruption Agency, a trap was laid and RM800 in marked notes were handed to the appellant. The appellant was arrested after he left the office with the money. About 10 minutes after his arrest, the appellant told the arresting officer that the said RM800 was for advertisement in Persatuan Bajau.

In this appeal the appellant argued *inter alia* that PW3 was an accomplice and her evidence therefore required to be corroborated. The appellant further contended that the sessions Judge was wrong in ruling that no reasonable doubt was raised by the defence.

Held:

[1] PW3 is not an accomplice as she played no active part in the transaction. She only stated what was demanded by the appellant to her employer. PW3 shall not be presumed to be unworthy of credit. Even if she is, the Sessions Court Judge found corroboration before accepting evidence of PW3.

[2] PW3 is a truthful and reliable witness. The Sessions Judge had the opportunity and advantage of assessing PW3's demeanour and made a correct finding of fact as to her credibility.

[3] The appellant's explanation as to the RM800 is not only unbelievable but has also cast no reasonable doubt upon the prosecution case. No higher burden had been imposed on the appellant and the appellant had also failed to rebut the presumption under s. 14 of Prevention of Corruption Act 1961 on a balance of probabilities.

Cases referred to:
Abdul Hamid bin Muhamad v PP [1953] 19MLJ 26 ***(foll)***
Ahmad Shah bin Hashim v PP [1980] 1MLJ 77 ***(foll)***
De Silva v PP [1964] 30MLJ 81 ***(foll)***
Koon Chye Hin v PP [1961] 27MLJ 105 ***(foll)***
PP v Saimin [1971] 2MLJ 16 ***(refd)***

Legislation referred to:
Prevention of Corruption Act 1961, ss. 3(a)(ii), 4(a), 14, 18

For the prosecution - DPP Ahmad Kamal
For the appellant - Ansari Abdullah; M/s. Ansari & Co.

JUDGMENT

Tee Ah Sing JC:
This is an appeal by Musli Oli ("the appellant") against his conviction and sentence.

In Kota Kinabalu Sessions Court Criminal Trial No. 15/88 he was charged as follows: ("the first charge")

> That you on 15 January 1988 at about 4.30 pm at premises of Poh Len Hing Hing Sdn. Bhd., Sedco Industries Estate, Mile 5 1/2, Jalan Tuaran, Inanam, in the District of Kota Kinabalu, in the state of Sabah, being an agent of the government of Malaysia, to wit, Penguasa Kastam attached to Sales Tax Section, Jabatan Kastam Dan Eksais Di Raja Malaysia, Kota Kinabalu Sabah did corruptly solicit through telephone a gratification, to wit, a sum of one thousand ringgit (RM1,000) from one Ho Mui Nyuk (F) at the said Poh Len hing Sdn. Bhd. premises as an inducement for you to do an act, to wit, to prepare and recommend "Laporan Pemeriksaan" in respect of Poh Len Hing Sdn. Bhd. account from January 1986 to October 1987 and that you have thereby committed an offence punishable under s. 3(a)(ii) of the Prevention of Corruption Act, 1961 (Laws of Malaysia Act No. 57).

And in Kota Kinabalu Sessions Court Criminal Trial No. 16/88 the appellant was charged as follows: ("the second charge")

> That you on 25 January 1988, at about 12.25 pm, at premises of Poh Len Hing Sdn.Bhd. Sedco Industries Estate, Mile 51/2, Jalan Tuaran, Inanam, in the District of Kota Kinabalu, in the state of Sabah, being an agent of the Government of Malaysia, to wit, Penguasa Kastam attached to sales Tax section, Jabatan Kastam Dan Eksais Di Raja Malaysia, Kota Kinabalu, Sabah did corruptly accept for yourself a gratification, to wit, a sum of RM800 in cash from one Khor Tek Moh as a reward for doing an act in relation to your principal's affairs to wit, to prepare and recommend "Laporan Pemeriksaan" in respect of Poh Len Hing Sdn. Bhd. account from January 1986 to October 1987 and that you have thereby committed an offence punishable under s. 4(a) of the Prevention of Corruption Act, 1961 (laws of Malaysia Act No. 57).

Both the charges were jointly heard.

In respect of the 1st charge the appellant was sentenced to 1 day imprisonment and fined RM1,000 in default 2 months imprisonment. And in respect of the 2nd charge he was sentenced to four months imprisonment and ordered to pay to the government a penalty of RM 800.

The prosecution case was that on 15 January 1988 at about 4.30 p.m. the appellant telephoned Ho Mui Nyuk (PW3) an account clerk of Poh Len Hing Sdn. Bhd at her office. The appellant told her there was something wrong with the accounts as the sales tax on sales

has drastically decreased. The appellant told PW3 to inform her boss Khor Tek Moh (PW2) about it. The accused further told PW3 that he (the appellant) could help her boss if he (PW2) could pay him RM 1,000. As PW2 was then not in, PW3 told the accused that she would talk to her boss.

PW3 managed to contact PW2 at about 9.30 a.m. the next day (16 January 1988). PW2 did not want to pay the RM1,000. At about 10.30 a.m. the appellant phoned, PW2 answered but passed the phone to PW3. PW3 told the appellant that her boss was not willing to pay RM1,000 as it is too high. PW3 suggested to the appellant that it was better for him to specify a figure. According to PW3 the accused then mentioned RM800. PW3 told the appellant she would tell her boss about it.

PW3 then discussed with PW2 in the company's office. PW2 did not want to give the RM 800.00 to the appellant for fear that the appellant would again come to him in future.

PW2 decided to inform the Anti Corruption Agency (ACA). Both PW2 and PW3 went to the ACA office on 18 January 1988. PW3 lodged a police report (exhibit P8) concerning the appellant's demand of RM1,000 as well as the appellant's later suggestion that he be paid RM800. A trap was laid by the ACA. PW2 was given marked notes amounting to RM800 (exhibit P4) to be handed to the appellant. As a pre-arranged signal to indicate to the trap officers that PW2 has handed over the money to the appellant, PW2 has to shout "angkat barang masuk". As it was not known when the appellant would come and get the money, the ACA kept surveillance on the premises of PW2's company for several days.

On 25 January 1988, the appellant telephoned PW2's office. PW3 answered the phone and told the ACA officer, Francisca Law (PW7) that the caller was the appellant.

At around 12.15 p.m. the appellant entered PW2's company office carrying a file. As soon as the appellant had entered the office PW2 came in from some other part of the building.

The appellant then opened up the file he was holding and told PW2 and PW3 that the document was the report. According to PW7, who was present in the office, the appellant also told PW2 and PW3 that the appellant's boss has no objection to the report. The appellant then asked PW2 whether he was applying for exemption of tax on toilet paper. PW2 told the appellant that he wanted to. Then PW2 asked the appellant whether he would have to pay anything. In the course of the conversation PW7 heard PW2 telling the appellant that the RM800 should also be for the application for the exemption. To this the appellant replied that the exemption of tax was a separate matter. PW2 asked the appellant whether the RM800 could be reduced, but the accused replied in the negative. The appellant however told PW2 that the amount for the exemption could be reduced. PW2 subsequently asked the appellant when should he (PW2) pay the RM800. The appellant replied "sekarang" as he had no money. The appellant showed his wallet to indicate he had no money.

PW2 then took out from his pocket the RM800 marked notes and gave it to the appellant.

The appellant, who was still in the office asked PW3 whether she made any report concerning the money. And PW3 answered that she did not. The appellant then took the money which the appellant had put on the table when PW2 handed over the trap money to him. The appellant put the money in his pocket.

PW2 then left the office and as he was leaving he called out "angkat barang masuk".

Thereafter an ACA officer Encik Yusuf Shamsudin (PW4) came in and identified himself and ask the appellant to produce the RM800. The appellant told PW4 that "dia hutang dengan

complainant." PW4 again asked the appellant to produce the money and he handed the money to PW4. PW4 cross checked with P4 and found that the serial number of the money tallied with the serial number in P4. 10 minutes after PW4 arrested the appellant, the appellant told PW4 that the money of RM800 was for the advertisement in Persatuan Bajau.

I shall deal with the first ground of appeal i.e. that the learned trial Judge erred in law and in fact in holding that the prosecution had establised a *prima facie* case at the end of the case for the prosecution.

In respect of the 1st ground of appeal I am of the view that the learned Sessions Court Judge had correctly decided that the prosecution has made out a *prima facie* case against the appellant in respect of both charges. At page 128 of the Appeal Record he states "Mahkamah berpendapat bahawa terdapat cukup keterangan- keterangan yang mana jika dipercayai memenuhi ingredients kedua-dua tuduhan terhadap orang kena tuduh." And at page 4 of his grounds of judgment he says "there been sufficient evidence which if believed would fulfil all the ingredients of each of the two charges against the accused, the accused was called upon to enter his defence."

The learned Sessions Court Judge had taken a maximum evaluation of the prosecution case. On the evidence adduced it is abundantly clear that the prosecution has made out a prima facie case against the appellant in respect of both charges, which if unrebutted, would warrant his conviction.

The second ground of appeal is that the learned trial Judge erred in fact in holding that PW3 was not an accomplice and that the testimony was corroborated by the other witnesses.

PW3 had not played any active part in the transaction. It was the appellant who demanded the bribe through PW3. PW3 did not make any offer to bribe the appellant. PW3 has not participated in the bargaining of the bribe. She only stated what was demanded by the appellant to her employer PW2.

The learned Sessions Court Judge was correct in holding that PW3 was not an accomplice and that her testimony was corroborated by the other witnesses. PW4 recovered the trap money from the appellant. So the testimony of PW4 also corroborates the evidence of PW2 and PW3. PW7 also corroborated her.

The learned Sessions Court Judge was correct when he made a finding that the Appellant demanded the sum of RM1,000 made through the telephone to PW3 on 15 January 1988.

PW3 did not take any imfamous part in the transaction. In our case there is the testimony of PW3 that it was the appellant who took the initiative by soliciting the bribe of RM1,000.00.

I am of the view that s. 18 of the Prevention of Corruption Act 1961 applied. I find that PW3 shall not be presumed to be unworthy of credit. (See case of *Abdul Hamid bin Muhamad v. PP* [1953] 19MLJ 26).

Even if PW3 was an accomplice the learned Sessions Court Judge had stated in his grounds of judgment at page 8 "In any case, to some extent PW3's evidence has been supported by the evidence of ACA officer, Francisca Law (PW7) who posed as an employee of Poh Lin Hing from 21-25 January 1988. On 25 January 1988 PW7 confirmed that the accused came in at about 12.15 p.m."

The learned Sessions Court Judge found corroboration before accepting the evidence of PW3

as being true.

I shall now deal with the third ground of appeal, i.e. that the learned trial Judge erred in fact in holding that PW3 was a trustful and reliable witness.

The learned Sessions Judge had given his reasons why PW3 is a trustful and reliable witness in his grounds of judgment at page 8.

> PW3 seems quite straight forward in the evidence. Although at the time of the incident relating to the present charges against the accused - PW3 was an employee of PW2, I find no reason why she would lie in Court. I am mindful of her allegation that the accused had threatened her after the accused had been released from police custody. But I do not think that incident would prejudice her mind to the extent that she would fabricate evidence against the accused. I do not, in the circumstances, consider PW3 as an accomplice. And I am in general satisfied of her truthfulness in giving evidence.

PW3 is a truthful and reliable witness. According to PW3 the appellant had solicited RM 1,000 through the phone on 15 January 1988. PW3 informed PW2 on 16 January 1988. Report (P8) lodged on 18 January 1988. There is no evidence of any grudge between PW2, PW3 and the appellant.

This is a question of fact. The learned Sessions Judge had the opportunity and the advantage of seeing the way the witnesses had given her evidence in Court and therefore he had an opportunity to see and assess her demeanour whether as a whole she was a truthful and reliable witness.

In *Ahmad Shah bin Hashim v. P.P.* [1980] 1 MLJ 77 at page 87 Chang Min Tat F.J, delivery the decision of the Federal Court said "Under such circumstances, where the findings depend on an assessment of the credibility and reliability of a witness, it is not the practice of this court sitting on appeal to refuse to accept them."

It was the contention of learned Counsel for the appellant that there were numerous discrepancies in the evidence of PW3 and thus she is unworthy of credit.

It is relevant to quote the case of *De Silva v. P.P.* [1964] 30 MLJ 81 at page 83 where his Lordship Gill J (as he then was) said

> Discrepancies and contradictions there will always be in any case. In considering them what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy.

In *Koon Chye Hin v PP.*[1961] 27 MLJ 105 His Lordship Thomson C.J. at page 107 stated:

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say however that because a witness has been proved a liar on one or two points then the whole of his evidence `must in law be rejected' is to go too far and is wrong.

The learned Sessions Court Judge had made a correct finding of fact in respect of the credibility of PW3. There are no contrary grounds for me to interfere with this finding.

I shall now deal with the other main ground of appeal that is the learned Sessions Court Judge erred in law and in fact in holding that the explanation of the appellant was unacceptable and that he had failed to raise a reasonable doubt and also the learned Sessions Court

Judge did not give due weight and consideration to the defence.

The learned Sessions Court Judge dealt with the appellant's defence as follows:

> From the accused's testimony, it appears that his main concern on 23 and 25 January 1988 was the unsatisfactory amount of donations and advertising money collected for the Malam Budaya Bajau. In fact, it is his evidence that in the morning of 25 January 1988 he and DW2 stopped by at the house of PSBB president to tell him of the situation. Then the accused went to Bowl Rama hoping to make a collection and even before leaving EPF he allegedly already collected some money. So prior to coming to Poh Lin Hing on 25 January 1988 the accused's mind seemed preoccupied with donations and selling advertisement spaces in conjunction with Malam Budaya Bajau.
>
> Strangely, however, he did not even bother to bring with him the PSBB file and the advertisement sample when he entered Poh Lin Hing's office. In the first place from the evidence. I do not think the accused could be absolutely certain that PW2 was not in. There was still a possibility that PW2 was in. Clearly there was no harm bringing along DW2 and the advertisement samples- just in case PW2 was in. After all, all morning prior to his coming to Poh Lin Hing's office, the accused's mind appears to have been preoccupied with getting more money for PSBB.
>
> If indeed, as appears from the defence evidence, all morning prior to going to Poh Lin Hing's office on 25 January 1988, the accused's mind was preoccupied with collecting more money for PSBB, then the accused's behaviour at the Poh Lin Hing's office was glaringly inconsistent. According to PW7, while the accused was inside the office, the conversation among the accused, PW2 and PW3 centred on "report", "exemption of tax" and RM800". Indeed, the accused himself, in his evidence confirmed that while in Poh Lin Hing's office on 25 January 1988, he never talk about advertisement. He testified that he did talk to PW2 and PW3 about Customs Department matters. Clearly therefore, once at the Poh Lin Hing's premises, the accused's main concern was no longer collecting money for PSBB, but rather "Customs Department matters". From the evidence, it was natural for both the accused and DW2 to enter Poh Lin Hing's office together with PSBB documents.
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> Instead, the accused planned his moves in such a way, that by the time he and DW2 reached Poh Lin Hing's office, only himself (accused) entered the office and while inside - only "Customs Department" matters were talked about.
>
> It is significant to note that only after taking the money (P4) from the table and only after shaking hands with PW3 did the accused want to call DW2 (according to accused's own evidence) to bring in the PSBB file and the advertisement samples. Quite clearly, this is an after thought on the accused's part. Even if the calling in of DW2 crossed the accused's mind while inside Poh Lin Hing's office, I am sure it crossed his mind only after the accused realised that he was caught in a trap. His wanting to call in DW2 only after thanking and shaking hands with PW3 is itself illogical: why should he shake hands and thank PW3 before the matters at hand- such as having the Poh Lin Hing's advertisement entered - were finalised? I am convinced that his claim of wanting to call in DW2 was a desperate attempt to camouflage the criminality of his having accepted the RM800 gratification.
>
> The accused's reaction to the ACA Officer's (PW4) comment ("apalah engkau buat macam ini") reveals further the hollowness of the accused's defence. If indeed the RM800 (P5) was meant to pay for the advertisement, why did not the accused spontaneously reply PW4 that the money was for advertisement? Instead the accused's instant reply was "apa lagi mau cakap pinjam duit pun tak bolehkah" - thereby indicating that the money was a loan. Only several minutes after the accused was arrested did the accused indicate to PW4 that the money was meant for PSBB advertisement.
>
> Reverting to the accused's demand for RM1,000 on 15 January 1988 in the afternoon, it was mentioned by PW3 both during examination-in- chief and cross examination. In the accused's

defence, he stated something to the effect that the mentioning of the RM1,000 was related to a request for donation to the PSBB - ("Satu muka..... RM1,000). However the defence never directly put to PW3 that the mentioning of the RM1,000 demand was in relation to request for donation. The learned counsel did however put to PW3 that the "RM800 was for donation....alternatively....for advertising in the (PSBB) sovenier program". PW3's answer was no".

It is my finding that the accused's attempt to connect the demand for RM1,000 to the request for donation was an after thought. This is especially so because as just pointed out, it was never directly put to PW3. However, as it was put to PW3 that the RM800 was for donation or advertisement, and since the RM800 actually refers to the RM1,000 (eventually reduced to RM800), it may be proper to consider it as put to PW3 that the RM1,000 was meant for donation or advertisement.

Be that as it may the accused's explanation as to the RM800 is not only unbelievable, but also has cast no reasonable doubt upon the prosecution case. From the evidence, if all along, the accused's demand for money (which was eventually reduced RM800) actually related to donation to PSBB, then why the glaringly inconsistent behaviour and reaction on the accused's part when arrested at Poh Len Hing's office? Why did the accused never talk about donation or advertisement while talking to PW3 and PW2 at Poh Len Hing's office on 25 January 1988. "Why was the accused's sponteneous reaction to PW4 "....pinjam duit pun tak bolehkah" instead of - "this money is for advertisement" or something to that effect? The reason is simply - that the alleged demand of RM1,000 eventually reduced to RM800 was actually a demand for bribe and nothing to do with donation or advertisement."

The learned Sessions Court Judge had considered the defence correctly.

The learned Sessions Court Judge had not put a higher burden on the appellant.

I refer to his grounds of judgment at page 11 which reads:

> For the above discussed reasons it was my finding that the accused's explanation in respect of both charges is not only unacceptable but also it has not cast any reasonable doubt upon the prosecution's case.

In respect of the second charge, the defence has failed to rebut on the balance of the probability the presumption under s. 14 of the Prevention of Corruption Act, 1961."

And at page 236 of the Appeal Record, "With due respect to the learned Counsel for the accused the defence in this case has failed to cast a reasonable doubt upon the prosecution's case in respect of both charges preferred against the accused".

It is clear that the learned Sessions Court Judge had put a proper burden on the accused. He has decided that the defence has not created any reasonable doubt on the prosecution's case.

In *P.P. v Saimin and others* [1971] 2MLJ 16 at page 17 His Lordship Sharma J stated "A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjuncture unrelated to evidence."

Having invoked the presumption under s. 14 in respect of the 2nd charge the learned Sessions Court Judge applied the correct test on the appellant's defence as laid down in *P.P. v Yuvaraj* [1969] 2MLJ 89 and found that the defence had failed to raise a reasonable doubt in his mind on the balance of probabilities. I find no reason to interfere with his findings.

I find that there are no merits whatever in the appeal against the conviction and sentence in

respect of the first charge. The appeal against conviction and sentence in respect of the first charge is therefore dismissed. I also find that there are no merits whatever in the appeal against conviction in respect of the second charge. The appeal against conviction in respect of the second charge is therefore dismissed.

As for the appeal against sentence, an imprisonment of 4 months imprisonment would in the circumstances of this case be rather excessive. I therefore allow the appeal against sentence. I set aside the sentence of 4 months imprisonment and substitute it with 1 day imprisonment and a fine of RM4,000 in default 4 months imprisonment. In so doing I am not saying that an offence of this nature should be viewed less seriously.